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In The

Supreme Court of the United States

October Term, 1977

No. 77-481

GREENE COUNTY PLANNING BOARD, TOWN OF GREENVILLE, TOWN OF DURHAM, NEW YORK AND ASSOCIATION FOR THE PRESERVATION OF DURHAM VALLEY,

Petitioners,

—against—

FEDERAL POWER COMMISSION,

Respondent,

POWER AUTHORITY OF THE STATE OF NEW YORK, et ano.,

Intervenors.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioners Town of Durham, New York and the Association for the Preservation of Durham Valley (collectively referred to herein as the "Durham Petitioners") respectfully request this Court to issue a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit, sitting *en banc*, entered in this action on June 30, 1977. Petitioners Greene County Planning Board and Town of Greenville join in this Petition and adopt the arguments set forth herein.

OPINIONS BELOW

The opinion of the Second Circuit *en banc* and the order granting rehearing *en banc*, neither of which have been officially reported, are included as Appendices A and B, respectively,

to this Petition.[1] The opinion of the panel of the Second Circuit, which preceded the *en banc* review and has not been officially reported, is annexed as Appendix C. An order amending the panel opinion in certain respects is annexed as Appendix D. The relevant portions of the orders of the Federal Power Commission (the "FPC") giving rise to this action are annexed as Appendices E and F.[2]

JURISDICTION

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1). The judgment of the Court of Appeals *en banc* was entered on June 30, 1977.

QUESTION PRESENTED

Does the FPC have the discretionary authority to reimburse impoverished intervenors in its licensing proceedings for their reasonable attorneys fees and expenses, where the Comptroller General of the United States has determined that such reimbursement is permitted by, and consistent with, the statutes governing the operation of, and expenditure of funds by, the FPC?

Despite the determination of the Comptroller General that reimbursement is permissible,[3] the FPC has denied that it has the authority to make such an award. A panel of the Second Circuit, one judge dissenting, held that the FPC had such

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[1] All Appendices cited in this Petition are included in a separately bound Appendix which has been filed with the Court concurrently herewith.

[2] Two prior reported Second Circuit decisions, in which Petitioners were parties, are related to this action and review many of the background facts. These opinions are: *Greene County Planning Board v. F.P.C.*, 455 F.2d 412 (2d Cir.), *cert. denied*, 409 U.S. 849 (1972) ("*Green County I*"), and *Greene County Planning Board v. F.P.C.*, 490 F.2d 256 (2d Cir. 1973) ("*Greene County II*").

[3] Four unreported opinions of the Comptroller General of the United States which authorize discretionary reimbursement, by the FPC and other federal agencies, of the fees and expenses of indigent intervenors in agency procedings, and which underlie Petitioners' position on this writ, are annexed as Appendices G-J.

discretionary authority and remanded this action to the FPC for further consideration of Petitioners' reimbursement requests. The Second Circuit *en banc*, in a closely divided vote, reversed the decision of the panel.

STATUTES INVOLVED

Section 111(d) of the Accounting and Auditing Act of 1950 (31 U.S.C. § 65(d)) provides:

> "It is the policy of the Congress in enacting this chapter that—
>
> "(d) The auditing for the Government, conducted by the Comptroller General of the United States as an agent of the Congress be directed at determining the extent to which accounting and related financial reporting fulfill the purposes specified, financial transactions have been consummated in accordance with laws, regulations or other legal requirements, and adequate internal financial control over operations is exercised, and afford an effective basis for the settlement of accounts of accountable officers."

Section 6 of the Dockery Act of 1894 as amended (31 U.S.C. § 74) provides, in pertinent part:

> "Disbursing officers, or the head of any executive department, or other establishment not under any of the executive departments, may apply for and the Comptroller General shall render his decision upon any question involving a payment to be made by them or under them, which decision, when rendered, shall govern the General Accounting Office in passing upon the account containing said disbursement."

Pertinent portions of Sections 2 and 308 of the Federal Power Act (16 U.S.C. §§ 793 and 825g) and Title IV of the Public Works for Water and Power Development and Energy Research Appropriation Act, 1977 (Pub.L.No. 94-355, 90 Stat. 889), which also relate to this action, are set forth verbatim in Appendix K hereto.

STATEMENT OF THE CASE

This case arises out of a seven year contested FPC licensing proceeding involving the appropriate routing of a 345 kilovolt high towered power transmission line which the Power Authority of the State of New York ("PASNY") proposed to construct through the heart of the scenic and historic Durham Valley, on the northern edge of the Catskills in Greene County, New York. (R 5648)[4] As originally planned, the transmission line would have cut an ugly swath from Gilboa, in Schoharie County, New York, through the Town of Durham, New York and the Durham Valley, along side of and bisecting the ages-old Susquehana Turnpike (which is listed on the National Register of Historic Places), to a terminus near Leeds, New York in Greene County.

In May 1970, the FPC granted the Durham Petitioners and the Greene County Planning Board leave to intervene in the FPC licensing proceeding concerning PASNY's Gilboa-to-Leeds transmission line, recognizing that their contributions to the proceeding "may be in the public interest." (R 5756)[5] Solely by dint of Petitioners' efforts,[6] the FPC was ultimately persuaded to reject PASNY's original proposed routing for the

[4] Numerals preceded by the letter "R" refer to the record in the court below. The prefix "Tr." refers to the FPC hearing transcript, which comprises the first 4,047 pages of the record. The prefix "Ex." refers to exhibits received at the FPC hearing.

[5] The Town of Greenville was granted leave to intervene one year later. In permitting the Town of Greenville to intervene, the FPC made the same finding of potential benefit to the public interest as it had in the case of the other Petitioners herein.

[6] During the course of the extensive FPC hearings held in this matter, the Durham Petitioners produced numerous highly qualified expert witnesses from a broad spectrum of disciplines to conclusively demonstrate their contention that a transmission line through the Durham Valley would be an environmental and cultural disaster. (The testimony of these experts commences at Tr. 3028 and continues intermittently for several hundred pages thereafter.) In addition, the Durham Petitioners prepared, assembled and introduced in evidence a multitude of documents, studies, photographs and slides — all demonstrating the unique scenic, historical and cultural aspects of the Durham Valley (*e.g.*, Exs. 98-111, 153A-K, 154, 155A-T, 156-161; R 5013-5125, 5360-5428).

line, as well as certain modifications thereof proposed by PASNY and the FPC Staff, and to adopt instead a route with far less adverse cultural, historic and environmental consequences. Even the FPC's Staff noted with approval the "contributions"[7] and "new insights . . . as to the unitary character of Durham Valley . . ." which were provided by the Durham Petitioners' expert witnesses (Staff Reply Brief to the Administrative Law Judge, April 24, 1974 at 13, 24). PASNY itself has admitted that the route finally selected was laid out in part by the Greene County Planning Board (PASNY Brief to the Second Circuit panel (Docket No. 76-4151), October 18, 1976 at 51).

The Durham Petitioners are impecunious. Substantially more than 1,000 hours of attorneys' time were devoted to the Durham Petitioners' efforts to preserve the Durham Valley, in opposition to the determined position of PASNY and the FPC Staff. Thousands of dollars of expenses were incurred by them — all without a penny of recompense. The other Petitioners herein are in similar circumstances and have devoted comparable efforts to this case.

The Petitioners, since 1971, have sought: (i) reimbursement for out-of-pocket expenses incurred on their behalf; (ii) reimbursement for experts' fees and expenses incurred on their behalf; and (iii) payment of a reasonable attorneys' fee to their

[7] These contributions were not made without difficulty. The Second Circuit, in its opinion in *Greene County I*, summarized a number of the procedural difficulties which had confronted Petitioners, including the need to seek judicial relief under the Freedom of Information Act, and stated:

> ". . . . we are constrained to note that the [FPC] at nearly every turn has made it difficult procedurally for the intervenors." 455 F.2d at 417, n. 12.

Later, in his vigorous dissent in *Greene County II*, Circuit Judge Mansfield noted that (i) the Commission's "use of procedural cat-and-mouse games in an effort to avoid a final order amounts to a sham. . ."; (ii) "The twists and rebounds in the FPC's process have already taxed their [the Durham Petitioners'] financial resources [footnote omitted]"; and (iii) ". . . the FPC in its conduct of the hearing has violated both the letter and spirit of an existing Court mandate." 490 F.2d at 260-261.

counsel and reimbursement of out-of-pocket expenses and disbursements incurred by counsel. (R 5840, 5930) Specifically, in *Greene County I,* the Petitioners requested an order requiring the FPC, or in the alternative PASNY, to pay their reasonable fees and expenses at the conclusion of the FPC proceeding. The FPC took the position before the Second Circuit that the application was premature and it "left open the question of whether ultimately to award them [fees] when the proceedings have come to an end." (455 F.2d at 425) The Second Circuit held that:

> ". . . [W]e find ourselves in agreement with the Commission's position that *at this posture of the proceedings* and *under current circumstances,* without a clearer congressional mandate we should not order the Commission or PASNY to pay the expenses and fees of petitioners. . . ." 455 F.2d at 426 (emphasis added).

During the FPC's administrative hearings the Petitioners renewed their reimbursement request. However, this request was denied by the Administrative Law Judge, and this denial was upheld by the FPC. *See* Appendices E and F. In rejecting the Petitioners' reimbursement application, the FPC concluded that it lacked the authority to make such an award, citing the Second Circuit's decision in *Greene County I* and this Court's ruling in *Alyeska Pipeline Service Co. v. Wilderness Society,* 421 U.S. 240 (1975). The FPC also ruled that, because the Petitioners represented "local towns and landowners who could conceivably have been damaged" by the power line, they were merely "protecting their own interests" and could not make a case for reimbursement as public interest intervenors. (Appendix E, at 40a-41a)[8]

The FPC subsequently denied the Petitioners' petition for rehearing of their reimbursement request. *See* Appendix F. Accordingly, Petitioners sought review in the Second Circuit pursuant to Section 313(b) of the Federal Power Act (16 U.S.C. § 825*l*(b)).

[8] Numerals followed by the letter "a" refer to the consecutively numbered pages of Petitioners' separate Appendix filed herewith.

The Petitioners based their request for review upon the decision of the Comptroller General of the United States in *Matter of Costs of Intervention — Nuclear Regulatory Commission,* Comp. Gen. File No. B-92288 (February 19, 1976), wherein he held that the Nuclear Regulatory Commission had the "statutory authority" to facilitate public participation in its proceedings by reimbursing intervenors for legal fees and other expenses when the agency found that (i) such participation was "required by statute or necessary to represent adequately opposing points of view . . ." and (ii) the intervenor is "indigent or otherwise unable to bear the financial costs of participation in the proceedings." (Appendix G, at 65a) The logic of the Comptroller General's opinion rested on the proposition that:

> ". . . where an appropriation is made for a particular object, purpose, or program, it is available for expenses which are reasonably necessary and proper or incidental to the execution of the object, purpose or program for which the appropriation was made, except as to expenditures in contravention of law or for some purpose for which other appropriations are made specifically available." Appendix G, at 51a.

The Petitioners also relied upon a second opinion of the Comptroller General, set forth in a letter to the Chairman of the Oversight and Investigations Subcommittee of the House Committee on Interstate and Foreign Commerce (Comp. Gen. File No. B-180224, May 10, 1976) which expressly made the holding of the Nuclear Regulatory Commission opinion applicable to the Federal Power Commission and eight other agencies of the federal government. (Appendix H, at 75a-78a)[9]

[9] The Comptroller General subsequently issued two additional decisions reinforcing and elaborating upon his earlier holding, in the Nuclear Regulatory Commission decision and the May 10, 1976 letter, that executive agencies, and particularly the FPC, had discretionary authority to reimburse impecunious intervenors in agency proceedings. These decisions are: Letter to Hon. William Clay, House of Representatives, Comp. Gen. File No. B-139703 (September 22,

On December 8, 1976, a majority of a panel of the Second Circuit held that the FPC had authority to award counsel fees and expenses to the Petitioners, and remanded the case to the FPC "for further consideration of [the Petitioners'] requests for reasonable reimbursement of their litigation expenses." (Appendix C, at 30a) The majority based its holding on the aforesaid decisions of the Comptroller General authorizing such reimbursement, noting that the Comptroller General is "Congress's agent for the purpose of determining the legality of administrative expenditures...." (*Id.* at 28a) Circuit Judge Lumbard, for the majority, added that:

> "Since public hearings are integral to the functioning of an agency such as the FPC, authorization for reimbursement of indigent intervenors who make important contributions in these hearings can reasonably be found in the agency's general statutory mandate. See 16 U.S.C. § 793 ('The commission may make such expenditures . . . as are necessary to execute its functions.') On this basis the Comptroller General's decision is not clearly incorrect and as a consequence the FPC now appears to have authorization to pay intervenors' expenses." Appendix C, at 28a-29a.

By a vote of five to three, the Second Circuit *en banc* reversed the panel's decision.[10] Circuit Judges Gurfein, Meskill and Mulligan joined in Judge Van Graafeiland's main opinion, which held that the rulings of the Comptroller General permitting reimbursement conflicted with the Second Circuit's prior holding in *Greene County I* that "the Federal Power Act did not authorize the making of such an award." (Appendix A, at 3a) Judge Van Graafeiland concluded that "our interpretation must control." (*Id.* at 4a) Chief Judge Kaufman concurred in a separate opinion. He noted the "critical and

1976) and *Matter of Costs of Intervention—Food and Drug Administration*, Comp. Gen. File No. B-139703 (December 3, 1976). Copies of these additional decisions, which were also relied upon by Petitioners in their submission to the Second Circuit *en banc*, are annexed as Appendices I and J, respectively.

[10] Circuit Judges Feinberg and Timbers did not participate in the consideration of whether to hold an *en banc* hearing, or in the determination *en banc*.

important role" that Petitioners have played in this prolonged FPC proceeding. However, he stated that, while "public funding has become necessary to the optimal functioning of the administrative process," he favored "an eschewal of 'judicial lawmaking'" and a resolution of the question by legislation. (Appendix A, at 7a-8a)

Circuit Judges Mansfield and Oakes joined in Judge Lumbard's dissenting opinion, which expressed the view that the Comptroller General's opinions did not conflict with *Greene County I*, and that the Comptroller General, as "Congress' chief agent for guarding the public fisc," had properly determined that the FPC had discretionary authority to make the requested reimbursement. The minority opined that the Comptroller General's "opinions on expenditure issues are comparable to those of any agency in its area of special responsibility, and they are entitled to at least as much deference from courts as is given to an enforcing agency's statutory interpretations. . . ." (Appendix A, at 11a)

REASONS FOR GRANTING THE WRIT

As more fully developed below, the Second Circuit *en banc* majority has usurped a function expressly entrusted by Congress to the Comptroller General — namely, the responsibility to determine the propriety of expenditures by the executive agencies. The Comptroller General, in his statutory capacity as "the agent of Congress" for the purpose of determining the legality of such expenditures, has ruled that the FPC has discretionary authority, under certain conditions, to reimburse impecunious intervenors for their costs of participating in agency proceedings. The Second Circuit, although unable to rule that the Comptroller General's determination was "clearly erroneous", nonetheless has held that the FPC lacks such authority, because the Comptroller General's determination appeared to conflict with its prior ruling in *Greene County I*.[11]

[11] For the reasons set forth in Point IV, *infra*, it is respectfully submitted that the Second Circuit's conclusion that the Comptroller General's position conflicts with the panel's holding in *Greene County I* is in error.

In so holding, the Second Circuit applied an improper standard of review, resulting in an impermissible invasion of the province of the legislative branch.

The issue presented by this petition—the propriety of fee *reimbursement* as authorized by the Comptroller General—is a novel and important one; it is separate and distinct from the question of the propriety of fee *shifting* between private litigants, addressed by this Court in *Alyeska Pipeline Service Co. v. Wilderness Society*, 421 U.S. 240 (1975). This case is of particular importance since it is apparent that confusion and conflict presently exist between certain of the executive agencies of the federal government as to the weight to be accorded to the Comptroller General's opinions as to fee reimbursement.

I
THE DECISION OF THE EN BANC MAJORITY BELOW IMPROPERLY USURPS THE FUNCTION OF THE COMPTROLLER GENERAL, AS THE AGENT OF CONGRESS, TO PASS UPON THE PROPRIETY OF EXECUTIVE EXPENDITURES

At the heart of this petition is the question of who should determine the propriety of expenditures by executive agencies of the federal government. As discussed in the Statement of the Case, *supra*, the Comptroller General of the United States has determined, in four separate opinions (*see* Appendices G-J), that executive agencies have the statutory authority to reimburse impecunious intervenors in agency proceedings for their reasonable attorneys' fees and other expenses where the agency has determined, in the sound exercise of its discretion, that the intervenors meet certain prescribed conditions.[12] The *en banc*

[12] The standards prescribed by the Comptroller General, which are articulated in greatest detail in his decision in *Matter of Cost of Intervention—Food and Drug Administration*, Comp. Gen. File No. B-139703 (December 3, 1976) (Appendix J), condition reimbursement upon a finding by the agency that (i) "a particular expenditure for participation 'can reasonably be expected to contribute substantially to a full and fair determination of' the issues before it even though the expenditure may not be 'essential' in the sense that the issues cannot be decided at all without such participation," and (ii) the proposed intervenor is "indigent or otherwise unable to finance its participation" in the agency's proceedings. Appendix J, at 113a, 117a.

decision of the Second Circuit effectively renders nugatory this determination without giving any substantive reason therefore except that, in the Second Circuit's view, the Comptroller General's opinions, at least insofar as they concern the FPC, appear to conflict (in fact, no such conflict exists) with the holding of the Second Circuit in *Greene County I*.

The Second Circuit claimed to find the authority to overrule the Comptroller General in Section 10(e) of the Administrative Procedure Act (5 U.S.C. §706), which provides that ". . . the reviewing court shall decide all relevant questions of law," and "interpret constitutional and statutory provisions" and shall "hold unlawful and set aside agency action . . . in excess of statutory jurisdiction, authority or limitations . . ." (Appendix A, at 4a). It then refused to "abdicate the responsibility thus conferred by holding that the authority of the Federal Power Commission is to be determined by the Comptroller General's determination of the law rather than our own." (*Id.*)

In reaching this conclusion, the Second Circuit far overstepped the bounds of its authority to review determinations of the Comptroller General, and wholly ignored the fact that Congress has given him, and not the judiciary, express statutory authority to pass upon the propriety of expenditures by the executive agencies. He is given this authority by Section 111(d) of the Accounting and Auditing Act of 1950 (31 U.S.C. §65(d)), which explicitly provides that:

> "It is the policy of the Congress in enacting this chapter that —

> "(d) The auditing for the Government, conducted by the Comptroller General of the United States *as an agent of the Congress* be directed at determining the extent to which . . . *financial transactions have been consummated in accordance with laws, regulations or other legal requirements.* . . . "(emphasis added)

In simplest terms, Congress has designated the Comptroller General as its agent for determining whether federal expenditures have been made in accordance with the language and intent of the statutes passed by Congress. His determination in such matters is preeminent, unless it is so arbitrary or capricious as to be clearly erroneous.

Necessarily, the fulfillment of this role by the Comptroller General requires him to engage in the review and interpretation of statutes. This is clearly evidenced by the provisions of Section 6 of the Dockery Act of 1894 (31 U.S.C. §74) which, in the course of completely reorganizing the system of governmental auditing and accounting, provided that:

> "Disbursing officers, or the head of any executive department, or other estasblishment not under any of the executive departments, may apply for and the Comptroller General shall render his decision upon *any question involving a payment to be made by them or under them,* which decision, when rendered, shall govern the General Accounting Office in passing upon the account containing said disbursement." (emphasis added)

In addition, the Attorney General has held, in a series of opinions following the enactment of the Dockery Act, that the Comptroller General may properly engage in statutory interpretation in the course of determining the propriety of executive expenditures. For example, in *Payment of Traveling Expenses of Officers' Dependents— Question for Comptroller General,* 33 Op. Att'y. Gen. 265 (1922), the Attorney General declined to answer an inquiry from the Secretary of the Navy concerning the authority of the Department of the Navy to pay the

traveling expenses of officers' dependents to and from stations outside the continental United States. Instead, the Attorney General directed the Secretary of the Navy to submit his inquiry to the Comptroller General. Citing what is now 31 U.S.C. §74, the Attorney General ruled:

> "The above-quoted section [§74] places an *obligation* on the Comptroller of the Treasury [now the Comptroller General] to render a decision upon any question involving a payment to be made by or under the head of any Executive Department, and *contemplated the construction by him of statutes.* 21 Op. [Atty. Gen.] 178, 181 [1895].
>
> "The [Comptroller General] is charged with the duty of rendering decisions upon questions involving payments to be made by or under the direction of the head of an Executive Department, *and his decision is final and conclusive as to all executive officers.* 22 Op. [Atty. Gen.] 581 [1899]; 23 Op. [Atty. Gen.] 468 [1901]; 25 Op. [Atty. Gen.] 185 [1904]." 33 Op. Atty. Gen. at 267 (emphasis added).

It is clear that judicial review of decisions by the Comptroller General as to the propriety of expenditures by the Executive branch of the Government is governed by the same "clearly erroneous" standard that guides courts in passing upon actions by the federal agencies within their spheres of expertise. Thus, in *Brunswick v. Elliott,* 103 F.2d 746 (D.C. Cir. 1939), the Secretary of State, acting upon the advice of the Comptroller General, refused to pay a retirement annuity to a retired Foreign Service officer who had subsequently obtained other gainful government employment. The retired Foreign Service officer sought injunctive relief ordering, among other things, that the Secretary of State pay him his annuity and that the Comptroller General be enjoined from interfering with or preventing such payment. The District Court denied the injunctive relief requested and dismissed the complaint, and the Court of Appeals affirmed. Even though the Court of Appeals noted that the substance of the Comptroller General's advice

was "not free from reasonable doubt" (103 F.2d at 750), it nonetheless held:

> "There can be no doubt that the matter came within the jurisdiction of the Comptroller General. The Budget and Accounting Act of June 10, 1921, 42 Stat. 20, 31 U.S.C.A. §1 et seq., provides that . . . *the Comptroller General shall, upon request of a proper officer, render a decision such as that which is involved in the present case.*
>
> "When the fact of appellant's double compensation came to [the Comptroller General's] attention, therefore, *it became his duty to inquire into the matter and answer the question thus presented. Unless the answer to this question was so free from doubt as to require no exercise of judgment or discretion,* his duty in the premises was not merely ministerial and an injunction to restrain him from acting as he has done would be improper." *Id.* at 748-749 (footnotes omitted; emphasis added).[13]

See also Doehler Metal Furniture Co., Inc. v. Warren, 129 F.2d 43 (D.C. Cir. 1942); *United States ex rel. L. Margulies & Sons, Inc. v. McCarl,* 10 F.2d 1012 (D.C. Cir.), *cert. denied,* 273 U.S. 699 (1926); *United States ex rel. Carrol Electric Co. v. McCarl,* 8 F.2d 910 (D.C. Cir. 1925). Significantly, the *Brunswick* court stated that the Comptroller General's decision necessarily "was required to be based upon an interpretation of statutes. . . ." *Id.* at 750 (emphasis added).[14]

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[13] This Court's decision in *Miguel v. McCarl,* 291 U.S. U.S. 442 (1934), cited by the Second Circuit majority *en banc,* is not to the contrary, since in that case the Comptroller General's ruling was found to be clearly contrary to law.

[14] The weight to be given a decision of the Comptroller General in a case such as the present one is further demonstrated by the remarks of the Third Circuit in *Citizens for a Safe Environment v. Atomic Energy Commission,* 489 F.2d 1018, 1022 n.3 (3d Cir. 1974) (*dictum*) and by the observations in Note, *Federal Agency Assistance to Impecunious Intervenors,* 88 Harv. L. Rev. 1815, 1827-1828 (1975). *See also* Comment, *Agency Funding of Indigent Public Interest Intervenors in Administrative Proceedings,* 6 ELR 10052 (1976).

In the present case, the Comptroller General has clearly determined, in response to proper requests both by executive agencies (*see* Appendices G and J) and by a *committee of Congress* (*see* Appendix H), that a number of federal agencies, specifically including the FPC, may properly expend public funds to pay an indigent intervenor's expenses in an agency proceeding. This was not a mere "ministerial" determination, but a matter expressly addressed by Congress, pursuant to 31 U.S.C. §§65(d) and 74, to the sound discretion of the Comptroller General in his capacity as the chief accounting and auditing officer of the United States. Indeed, this determination operates to bind the General Accounting Office, in the course of its audit of the FPC's expenditures, to approve such a payment.

As the panel of the Second Circuit initially recognized, the Comptroller General's reimbursement decision is "not clearly incorrect." (Appendix C, at 28a-29a) Significantly, the *en banc* majority did not dispute this point. Petitioners respectfully submit that, under these circumstances, for the *en banc* majority to hold that the FPC nonetheless is without authority to make reimbursement — in the face of clear statutory language authorizing the Comptroller General, as the agent of Congress, to make this determination — manifestly amounts to an improper exercise of its judicial power and an impermissible infringement upon the province of the legislative branch of our federal government.

II
THERE IS CONFUSION AMONGST THE EXECUTIVE AGENCIES AS TO THE PROPER INTERPRETATION OF THE COMPTROLLER GENERAL'S DECISIONS

Recognizing the importance of the recent decisions of the Comptroller General permitting reimbursement of fees and expenses of indigent agency intervenors, several federal agencies have already moved affirmatively to promulgate rules covering reimbursement of participants in their regulatory and rulemaking proceedings. Other agencies, including, of course,

the FPC, have questioned the extent of their authority, if any, to make reimbursement and have refrained from implementing any reimbursement program pursuant to the Comptroller General's rulings.

Those agencies that have initiated programs have relied upon the opinions of the Comptroller General or the reasoning expressed therein as authority for these new programs. For example, the Department of Transportation ("DOT") has commenced rulemaking proceedings with respect to a department-wide reimbursement program, and has also implemented a one-year "demonstration program" for reimbursing indigent participants in administrative proceedings before the National Highway Traffic Safety Administration ("NHTSA"), a division of the DOT, for their "reasonable out-of-pocket costs of participation such as attorneys fees, expert witness fees, and clerical and travel expenses. . . ." DOT, NHTSA, Financial Assistance to Participants in Administrative Proceedings, Final Rule and Advance Notice of Proposed Rulemaking, 42 Fed. Reg. 2863, at 2865 (1977). With respect to its statutory authority for initiating the NHTSA demonstration program, the DOT stated:

> "*Statutory authority for program.* The DOT has adequate statutory authority to conduct this program of assistance. Under the Department of Transportation Act, 49 U.S.C. §1651, et. seq. and related statutes, the DOT and its component agencies have broad responsibility for safety regulation, energy conservation and the sound development of the various transportation modes. The Comptroller General has held that while 31 U.S.C. §628 prohibits agencies from using appropriate funds except for the purpose for which the appropriation was made, an appropriation made for a particular object, purpose of [sic] program 'is available to finance expenses which are reasonably necessary and proper or incidental to the execution of the object, purpose or program for which the appropriation was made. . .' 53 Comp. Gen. 351, 364 (1973). See also 50 Comp. Gen. 534, 536 (1971); 44 Comp. Gen. 312, 314 (1964); *Northern States Power Co. v. FPC,* 118 F.2d 141, 143 (7th Cir. 1941)." *Id.* at 2864.

The DOT also placed additional reliance directly on the Comptroller General's Nuclear Regulatory Commission and Food and Drug Administration decisions (Appendices G and J) as authority for the NHTSA's pilot reimbursement program. (42 Fed. Reg. at 2864-2865)

In addition, the Food and Drug Administration ("FDA"), the Civil Aeronautics Board ("CAB") and the Environmental Protection Agency ("EPA") have initiated rulemaking proceedings with respect to reimbursement programs for participants in their administrative activities. In its Advance Notice of Proposed Rule Making the FDA stated:

> "Increasing attention has been given in recent years to the financial barriers to effective public participation in agency proceedings. The Administrative Conference of the United States has recommended that agencies consider measures to facilitate public participation under 1 CFR 305.71-6." Department of Health, Education and Welfare, FDA, Administrative Practices and Procedures, Advance Notice of Proposed Rule Making, 41 Fed. Reg. 35,855 (1976).

The FDA concluded:

> "Authority to compensate intervenors is inherent in FDA's broad regulatory powers, its Congressionally mandated hearing procedure, and the wide discretion afforded in its appropriations legislation. It is barred neither by FDA's authorizing legislation nor its appropriations authority." *Id.* at 35,859.[15]

The Advance Notices of Proposed Rulemaking of the EPA (42 Fed. Reg. 1492 (1977)) and the CAB (42 Fed. Reg. 8663 (1977)) contain statements substantially the same as those quoted from the FDA Advance Notice.

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[15] The FDA's proposed reimbursement program would permit compensation for "reasonable attorneys fees, expert witness fees, and other reasonable costs of participation incurred" by indigent participants (as defined therein) in the agency's proceedings.

Finally, the Federal Energy Administration ("FEA"), in connection with certain specific proceedings, has allowed indigent public interest intervenors to apply for, and has granted, funds from its general budget to defray such intervenors' fees and other costs of participation in FEA proceedings. The FEA expressly relied upon the Comptroller General's Nuclear Regulatory Commission decision and his May 10, 1976 letter as authority to make such expenditures. *See* FEA, Petition for Special Redress—Consumers Union of United States, Inc., 42 Fed. Reg. 10,891 (1977). *See also* FEA, Petition for Special Redress—Consumers Union of United States, Inc., 42 Fed. Reg. 16,660 (1977) *and* FEA, Supplemental Order—Consumers Union of United States, Inc., 42 Fed. Reg. 27,027 (1977).

In contrast to the position taken by the DOT, FDA, EPA, CAB and FEA, the Nuclear Regulatory Commission — itself the object of the Comptroller General's seminal reimbursement decision — while accepting the Comptroller General's ruling as to its legal authority to make reimbursement, has taken the position that it would not institute any reimbursement program in the absence of express Congressional authorization. Nuclear Regulatory Commission, Financial Assistance to Participants in Commission Proceedings, Statement of Considerations Terminating Rulemaking, 41 Fed. Reg. 50,829, 50,830-31 (1976).[16] Similarly, the Federal Communications Commission has stated that it has "no doubt whatsoever" as to its authority to reimburse indigent intervenors for their attorneys' fees and expenses, but has opted nonetheless to provide only limited aid (in the nature of free transcripts and modified filing and other procedural requirements) unless Congress provides express

[16] It is worth noting, however, that the NRC simultaneously announced its intention to seek a $200,000 special appropriation from Congress in order to permit it to render financial assistance to indigent participants in one particular NRC proceeding (known as the "GESMO" proceeding) which it believes to be "of singular importance." Nuclear Regulatory Commission, Financial Assistance to Participants in Commission Proceedings, Statement of Considerations Terminating Rulemaking, 41 Fed. Reg. 50,829, at 50,834-35.

authorization for more extensive relief. Federal Communications Commission, Rules and Policies to Facilitate Participation of Indigent Persons in Commission Proceedings, 41 Fed. Reg. 53,019, at 53,021 (1976). The FPC, of course, has consistently maintained that in no case and under no circumstances does it have the authority to make reimbursement.

This Court should grant the requested writ of certiorari in order to resolve the apparent confusion amongst the federal agencies as to the weight to be given the Comptroller General's reimbursement decisions.

III

THIS CASE INVOLVES A NOVEL AND TIMELY QUESTION OF LAW, UPON WHICH THIS COURT HAS NOT YET PASSED

The propriety of reimbursement of the fees and expenses of indigent advocates of the public interest is clearly a timely issue. *See* Note, *Federal Agency Assistance to Impecunious Intervenors,* 88 Harv. L. Rev. 1815 (1975); Comment, *Agency Funding of Indigent Public Interest Intervenors in Administrative Proceedings,* 6 ELR 10052 (1976). Recently, in *Alyeska Pipeline Service Co. v. Wilderness Society,* 421 U.S. 240 (1975), this Court had occasion to consider the question of fee *shifting* from one private adversary to another and declined to alter the so-called "American Rule" that, absent a statute or enforcible contract providing for fee shifting, private litigants must bear their own attorneys' fees. However, this Court has not previously addressed the distinctly different issue presented here — the propriety of the Comptroller General's determination authorizing fee *reimbursement* by a federal governmental agency, from its appropriated funds, to an impoverished participant who represents a vital interest in, and makes an important contribution to, an agency proceeding.

As the Comptroller General correctly noted in his Nuclear Regulatory Commission decision (Appendix G, at 63a-65a), fee reimbursement, unlike fee shifting, does not penalize un-

successful litigants. Nor does it in any meaningful way increase the costs incurred by entities regulated by our federal agencies.[17] Finally, fee reimbursement does not involve any element of compulsion by or against any party; indeed, under the Comptroller General's decisions, the question of whether, and how much, to reimburse an intervenor is left to the sound discretion of the forum agency.

As the Second Circuit panel noted:

> "Where environmental issues are involved, a salutary public interest is served if the parties affected have the opportunity to express their views. Otherwise, the [FPC] could be limited to the information made available to it by the power companies and business interests directly involved." Appendix C, at 29a.

The Durham Petitioners respectfully submit that the importance and timeliness of the issue involved in this case, and the clear distinction between fee reimbursement and the type of fee shifting involved in *Alyeska,* make this case an appropriate one for the exercise of this Court's certiorari jurisdiction.

IV

THE SECOND CIRCUIT ERRONEOUSLY CONCLUDED THAT THE COMPTROLLER GENERAL'S DECISIONS CONFLICT WITH GREENE COUNTY I

The Second Circuit's *en banc* decision was premised on the assumption that the Comptroller General's recent decisions concerning reimbursement were in irreconcilable conflict with

[17] Of course, to the extent that any increased operating costs might be recouped either from, say, the public at large or from the entities regulated by a particular agency, some *de minimis* financial cost might be fall the broad classes of all taxpayers or all agency licensees as a result of the exercise, by an agency, from time to time, of its discretionary authority to reimburse an indigent intervenor's expenses. However, such a miniscule cost clearly bears no resemblance whatsoever to the direct and substantial financial impact which would result to a particular litigant (or litigants) as a result of fee shifting.

the decision rendered by a panel of that court in January 1972 in *Green County I.* The *en banc* majority stated:

> ". . . We are thus met squarely with the issue of whether this Court's interpretation of the Federal Power Act or that of the Comptroller General shall control the disposition of this appeal. We hold that our interpretation must control." Appendix A, at 4a.

In fact, the *en banc* majority misconstrued both the arguments of the Petitioners in *Greene County I* and the holding of the panel with respect thereto. Petitioners claimed in *Green County I* that an award of fees and expenses was permissible pursuant to Sections 309 and 314(c) of the Federal Power Act, 16 U.S.C. §§ 825h and 825m(c). These statutes deal, respectively, with the FPC's rule making powers and its authority to employ attorneys for its own use. The *Greene County I* panel was unable to find in these statutes any requirement that the FPC pay intervenors' expenses, and concluded:

> ". . . [W]e find ourselves in agreement with the [FPC's] position that *at this posture of the proceedings and under current circumstances,* without a clearer congressional mandate we should not order the [FPC] . . . to pay the expenses and fees of petitioners. . . .
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> "Without a showing of compelling need, it would be premature for us to inject the federal courts into this area of administrative discretion, perhaps foreclosing more flexible approaches through agency action or rules." 455 F.2d at 426, 427 (emphasis added).

The "far clearer" Congressional mandate that the Court sought was thus a mandate "far clearer" than that provided by the two statutory provisions relied on by Petitioners in *Greene County I.*

Such a mandate—authorizing precisely the "flexible [approach] through agency action or rules" contemplated in *Greene County I*—has since been given in the form of the recent opinions of the Comptroller General, Congress' agent for

determining the legality of administrative expenditures. Significantly, the authority to reimburse impecunious intervenors is based, under the reasoning of the Comptroller General's recent decisions, upon (i) the statutory provisions authorizing administrative agencies to hold hearings and admit interested parties as participants therein, (ii) the statutory provisions permitting agencies to make such expenditures as are necessary to execute their functions and (iii) the annual appropriations bills which, in the case of each particular agency, authorize use of appropriated funds "for necessary expenses" in carrying out the agency's functions. (Appendix G, at 49a-50a; Appendix H, at 77a-78a) In the case of the FPC, the relevant statutes underlying the Comptroller General's opinions — *none* of which were considered by the panel in *Greene County I* are (i) Section 2 of the Federal Power Act, 16 U.S.C. §793, which authorizes the FPC to make "such expenditures . . . as are necessary to execute its functions," (ii) Section 308 of the Federal Power Act, 16 U.S.C. § 825g, which provides that the FPC in its hearings may admit as a party any "person whose participation in the proceeding may be in the public interest," and (iii) the FPC's 1977 appropriations law (*see* Title IV, Public Works for Water and Power Development and Energy Research Appropriation Act, 1977, Pub. L. No. 94-355, 90 Stat. 889, at 898), which provides the general appropriation to pay "for necessary expenses" for the work of the FPC.

Finally, the issue in this case is distinctly different from that in *Greene County I*, in that it involves the question of the discretionary authority of the agency to make the requested reimbursement. It does not involve compulsory reimbursement, as sought by Petitioners in *Greene County I*. Petitioners here seek only confirmation that the FPC has authority to consider their reimbursement request, and an order that the FPC consider the question of whether the Petitioners fairly meet the standards set forth in the Comptroller General's opinions to qualify for reimbursement.

CONCLUSION

For the reasons set forth herein, a writ of certiorari should be granted and the judgment below should be reversed.

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Respectfully submitted,

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